ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:	)	**MM DOCKET NO. 91-221**
	)	
REVIEW OF THE COMMISSION'S	)	
REGULATIONS GOVERNING	)	DOCKET FILE COPY ORIGINAL
TELEVISION BROADCASTING	)	

To: The Commission

COMMENTS OF THE FREEDOM OF EXPRESSION FOUNDATION, INC.

Respectfully submitted,

FREEDOM OF EXPRESSION FOUNDATION, INC.

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May 17, 1995

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SUMMARY

The Freedom of Expression Foundation, Inc. ("FOE"), submits that the continued enforcement of the multiple ownership restrictions against Television licensees is overly restrictive, contrary to economic viability of the television industry, unnecessary in view of the explosive growth of media information services, and unconstitutional. Accordingly, the current restrictions should be eliminated and/or substantially relaxed to reflect current marketplace considerations, and to avoid further inhibition on the already beleaguered television industry.

A number of alternative video delivery services, including cable service, wireless cable service, DBS, SMATV and video dialtone service, enjoy competitive advantages over television service as a result of the lack of any numerical restriction on ownership. Television's competitive disadvantage is reflected in declining revenues. Relief from the numerical restrictions on television licensees would result in economies of scale that would allow licensees to compete with other video services.

Explosive growth of other media services, including the sheer number of commercial and non-commercial television stations, cable systems, availability of cable channels, wireless cable, SMATV, DBS, video dialtone service, low power television stations and FM stations nationally must all be considered in the determination of whether to relax and eliminate restrictions on television ownership. The Commission should also consider the extent to which information is available to the general public through the alternative sources of computer information services, and through the Internet. Sufficient national and local outlets exist to warrant elimination of the national numerical restriction, and substantial relaxation of the 'audience reach' cap on ownership. The duopoly rule should be relaxed to allow for a presumption for grant of applications proposing duopoly ownership in

the largest markets, to allow for a presumption for grant of applications proposing duopoly ownership in medium sized markets where a minimum number of independent media outlets remain available to ensure diversity, and to allow for case-by-case consideration of waivers to permit duopoly ownership in smaller markets. The one-to-a-market rule should be eliminated in order to permit television stations to own radio outlets in the same market, since on the average, no threat to diversity would likely ensue. The Newspaper-Broadcast Cross Ownership Rule should also be eliminated, since it is outdated, and unnecessary in view of the diverse sources of information sources available to all segments of the public, in both large and small markets.

Given the diversity of media voices and other generally available sources of information, the past growth pattern and the potential growth of such services in the foreseeable future, continued restrictions on television broadcast licensees cannot be deemed constitutional. The present rules discriminate among video delivery services and speakers based on the nature of the service, and is highly suspect. Nor are the present restriction sufficiently narrowly tailored to pass constitutional muster. The previously stated goal of diversity which underlies prior regulation restricting the First Amendment rights of television licensees no longer exists. Accordingly, present regulations must be modified to impose the least restrictive burden on the First Amendment rights of television licensees.

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COMMENTS OF THE FREEDOM OF EXPRESSION FOUNDATION, INC.

FREEDOM OF EXPRESSION FOUNDATION, INC. ("FOE"), by Counsel, and pursuant to Section 1.415 of the Rules[1] hereby respectfully submit these Joint Comments in response to the Commission's Further Notice of Proposed Rulemaking ("*FNPRM*"), released January 17, 1995, concerning proposed changes in the Commission's Regulations governing television broadcasting.[2]

STATEMENT OF INTEREST

1. ***FOE***. FOE is a private membership corporation which seeks, through research and educational programs, to preserve and advance the First Amendment rights of the mass media, particularly the electronic mass media, and the freedom of the press, both print and electronic, from governmental intrusion in the editorial process and the dissemination of information by the press to the public. FOE's members and contributors include private foundations, publishers of daily newspapers, broadcast licensees, cable MSO's and program suppliers, trade associations for broadcasters and newspapers, regional telephone companies,

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[1]47 C.F.R. §1.415.

[2]FCC 94-322, MM Docket Nos. 91-221 and 87-8 (Released January 17, 1995).

and other corporate entities which generally support the research and educational objectives of FOE. FOE has participated in numerous Commission proceedings in the past, with a view toward assisting the Commission to develop a full and complete record concerning the First Amendment implications of public policy alternatives. Given the vast changes in the communications industry during the past two decades, which have resulted in a substantial increase in the diversity of information and outlets of communication, First Amendment considerations require the FCC to revise and "modernize" its structural and ownership regulations, including cross-ownership regulations, for television.

2. FOE has a direct interest in the development and maintenance of a competitive system of diverse video delivery technologies, and supports the adoption of policies by the Commission that would promote diversity through the lifting of artificial barriers on the ownership and control of video communications entities, which inhibit the full and robust exercise of freedom of expression by these entities.

3. More specifically, in response to the Commission's *FNPRM*, FOE believes the following changes should be made in the Commission's current multiple ownership and media cross-ownership policies:

(a) The national numerical ownership limits of twelve (or, in the case of minority-controlled licensees—fourteen) television stations should be eliminated;

(b) The alternative "national audience reach" limits of 30% and 25% for minority and nonminority licensees, respectively, should be eliminated or substantially relaxed;

(c) The television duopoly rule should be substantially relaxed to permit joint ownership, joint operating agreements or other joint ventures to take advantage of economies of scale in the marketplace;

(d) The Television-Radio Cross-Ownership (or "One-to-a-Market") rule should be eliminated to permit joint ownership, joint operating agreements, or other joint ventures of television and radio stations in a single market to take advantage of economies of scale in the marketplace.

(e) The Newspaper-Broadcast Cross-Ownership Rule should be eliminated or substantially relaxed to permit joint ownership, joint operating agreements, or other joint ventures of television and publishers of daily newspaper in a market in order to take advantage of economies of scale in the marketplace.

FOE respectfully submits that continued enforcement of these rules and policies no longer serves the stated public interest goals of promoting competition and diversity, is counterproductive to effective competition among video media, and places significant and unjustified barriers to the exercise of First Amendment rights. The following analysis is advanced to support this thesis.

I. INTRODUCTION

A. Development of Broadcast Ownership Policies

4. The development of broadcast ownership policies and Rules is set forth in the *FNPRM*, and need not be detailed again here.[3] Originally, the Commission's adoption of rules and policies restricting ownership of broadcast facilities were explicitly premised on the advancement of Commission policies that (1) discouraged possible broadcast monopolies and encouraged local initiative,[4] and (2) fostered diversity of thought and viewpoint in the information

[3]*See FNPRM*, at ¶¶2-5.

[4]*See e.g., Report and Order*, 18 FCC 288 (1946); *Ownership Report and Order*, 100 FCC 2d 17 (1984) 56 RR 2d 859.

marketplace.[5] However, the Commission has, from time to time, articulated policies designed to *protect* a newly emerging industry, such as FM or UHF Television, and *promote* its growth, by exempting it from certain of the ownership restrictions otherwise applicable to broadcasting.[6]

5. Between 1954 and 1984, the FCC several times revisited the numerical limitation rule, but only to question whether an absolute numerical limit, rather than geographic or nature of service limits, was the most appropriate form of regulation. In 1984, the FCC recognized that it "not only has the authority to reexamine longstanding rules as circumstances change, but it is virtually required to do so in order to ensure that it continues to regulate in the public interest."[7]

6. The Commission has, in the *FNPRM*, acknowledged the tremendous changes in the video marketplace, and has further acknowledged that the growth of the cable industry since 1985 has generated increased competition for broadcast television.[8] Onset of new services such as DBS and MMDS, the re-regulation of cable television in 1992, and the entry of telephone companies in providing video-

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[5]*See, e.g., Genesee Radio Corp.*, 5 FCC 183 (1938).

[6]The Commission has consistently exempted AM-FM combinations from the one-to-a-market rule, initially because FM Broadcasting was new service needing the economic support of the more established AM broadcast industry, and now because the reverse is true. *See* 47 CFR §73.3555(a), (b); Similarly, the Commission has always looked favorably upon requests for waivers of the one-to-a-market rule by UHF television stations where a showing could be made that (i) the UHF TV station had experienced financial losses and (ii) program diversity would not be seriously reduced by such a combination. More recently, the Commission has ruled that in the top 25 markets, no showing of a "failed station" need be made if, after the proposed combination, there would still be 30 separately owned broadcast licenses in the ADI. *See* 47 CFR §73.3555 NOTE 7. Additionally, the Commission has consistently avoided imposition of any similar ownership restrictions on new video-related non-broadcast services, such MMDS and IVDS, and has placed no ownership or "reach" restrictions on video services provided under newly-emerging video-dialtone services.

[7]*See, Report and Order* ("Multiple Ownership - Seven Station Rule), 100 FCC 2d 17, 56 RR 2d 859 (1984) (*citing Geller v. FCC*, 610 F.2d 973, 46 RR 2d 721 (D.C. Cir. 1979)).

[8]*FNPRM*, at ¶6, 11.

dialtone services will increase competition to TV stations, and may well warrant elimination or relaxation of the ownership restrictions.[9]

7. As the Commission itself has recognized, these dramatic changes in the video marketplace since these rules were first adopted have undermined the need for these rules on either competition or diversity grounds.[10] As will be shown in more detail below, the unprecedented proliferation of media, especially in large markets, and the wealth of information sources available in these markets underscores the conclusion reached by the FCC in another context that the public interest in viewpoint diversity "is fully served by the multiplicity of voices in the marketplace today."[11]

B. Competitive Advantages Enjoyed by Alternative Video Delivery Services

8. The success of newer video delivery services in competing for audiences and advertising revenues in the marketplace appears due, in no small way, to the freedom of these services from the ownership limitations and other regulatory constraints imposed by the Commission on broadcasters. Thus, while cable systems may not be commonly owned by television licensees in the same market,[12] and are subject to programming regulations concerning political broadcasts and other cable originated programming,[13] and to must-carry

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[9] *Id.*, at ¶12.

[10] F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991) ("*OPP Report*").

[11] *See*, *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, Report to Congress, 102 FCC 2d 145 (1985) (hereafter "*1985 Fairness Report*").

[12] 47 CFR §76.501(a).

[13] 47 CFR §76.205; *see also*, 47 CFR §§76.209 (Personal Attack and Political Editorial Rules applied to Cablecasting), 76.213 (Lotteries), and 76.221 (Sponsorship Identification

obligations,[14] there is no limitation on the number of systems a cable operator may own nationally or on "national audience reach (other than federal antitrust regulations applicable to all businesses).

9. Similarly, when DBS[15] and MMDS[16] services were first established by the Commission, licensees were made subject neither to numerical ownership limitations nor to program content regulations.[17] The rationale offered by the Commission at the time was that freedom from these restrictions was necessary to assure that the new technology could get a foothold.[18] Both DBS and MMDS are multichannel services. While complete and competitive DBS is not yet in place, many cities are now being served by both E and F MMDS licensees, who are subject neither to multiple ownership nor cross-ownership restrictions.

10. The chief competitive advantage of cable and the newer video over-the-air distribution services is multichannel capacity. Whereas television broadcasters and networks alike can only offer a single channel of programming, the cable and other video services, for virtually little or no increase in the cost of the physical plant, can, and do provide between 4 and 30 channels, or, in the case

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Rules).

[14]47 C.F.R. §76.51, *et seq.*

[15]*Report and Order*, ("Direct Broadcast Satellites"), 51 RR 2d 1341 (1983).

[16]*Report and Order* ("Multichannel MDS"), 94 FCC 2d 1203, 54 RR 2d 107 (1983), *recon. denied*, 49 FR 27, 14,147, 56 RR 2d 187 (1954); *Second Report and Order*, ("Multichannel Multipoint Distribution Service"), 57 RR 2d 943, 948 (1985)

[17]51 RR 2d at 1366-67. The "customer-programmer" exemption created by the Commission was later struck down by the D.C. Circuit, on the basis that the FCC was not free to disregard statutory programming obligations of the Article III of the Communications Act, such as 47 USC §312(a)(7) and §315a. *See, National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1203-04 (D.C. Cir. 1984) ("*NAB v. FCC*").

[18]*Second Report and Order*, ("Multichannel Multipoint Distribution Service"), 57 RR 2d 943, 948 (1985); *but see, NAB v. FCC, supra.*

of cable, as many as 150 separate channels of programming. DBS promises to provide up to 500 channels of programming.

11. The Commission, in other rule making contexts, has long recognized that, commensurate with joint operation of facilities come economies of scale which are translated into more capital to produce and acquire quality programming, thereby serving the public interest through both diversity and quality of programming.[19] If an entire broadcast video industry is precluded from the economic benefits to be derived from joint or multichannel operation, and other services are not, it is clear that the former must operate at a competitive disadvantage, and that there is not a level playing field.

12. Finally, broadcast television is at a competitive disadvantage because its revenues are derived solely from advertiser sponsorship of programming, a single income stream less responsive to consumer demand than subscriber fees. Other video services, such as cable, have two revenue sources -- advertising revenues *and* subscriber fees. As the Commission's Office of Plans and Policy noted in its recent Working Paper on broadcast television in the multichannel video marketplace:

> Cable networks can earn more revenue than broadcasters from audiences of equal sizes. For basic cable networks, this is because they collect fees from both advertisers and subscribers. For pay networks, it is because viewers value programming more highly than advertisers value viewers. This makes it possible for cable to outbid broadcasters for national or regional rights to programming, such as sports, where cable audiences are large.[20]

Accordingly, broadcast television is at a competitive disadvantage *vis-a-vis* other video delivery systems for both structural and regulatory reasons. FOE respect-

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[19]*Multiple Ownership Rules, supra. see also, Notice of Proposed Rule Making* in MM Docket No. 91-140 ("Revision of Radio Rules and Policies"), 6 FCC Rcd 3275, ¶4 (1991).

[20]*OPP Report, supra*, at 79.

fully suggests that the regulatory barriers to effective competition by broadcast television in the video marketplace are no longer necessary, are actually counter-productive to the Commission's primary goals concerning diversity, and are an undue burden on, and totally unjustifiable curtailment of, broadcasters' First Amendment rights. FOE strongly recommends the elimination of these regulatory constraints on ownership as soon as possible.

II. THE MULTIPLE OWNERSHIP RESTRICTIONS ON BROADCAST TELEVISION SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED.

A. The Explosive Growth of Alternative Video Information Sources Warrants Elimination of the National Numerical and "Audience Reach" Restrictions on Broadcast Television Ownership.

13. As noted above, the Commission has had occasion in the recent past to examine the state of both national and local video markets.[21] The enormous proliferation of video delivery systems over the last decade through both existing and new and emerging technologies is a matter of public record in this proceeding and elsewhere.[22]

14. Since 1970, the total number of commercial and non-commercial television stations has increased 76 percent; the number of commercial independent stations which have traditionally relied upon syndicated pro-

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[21]*See, Syracuse Peace Council,* 2 FCC Rcd 5043, 63 RR 2d 541 (1987); *Notice of Inquiry and Notice of Proposed Rule Making* ("Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries"), 2 FCC Rcd. 2393 (1987); *Radio Notice,* 2 FCC Rcd. 1138 (1987); *Report,* 102 FCC 2d 143, 58 RR 2d 1137 (1985); *Regional Concentration Rules,* 101 FCC 2d 402, 55 RR 2d 1389 (1984); *National Multiple Ownership Rules,* 100 FCC 2d 17, 56 RR 2d 859 (1984).

[22]*FNPRM,* at ¶¶12 - 14. See also, *In re Review of the Prime Time Access Rule,* FCC 94-266, ___ FCC Rcd ___, (1994) ("*PTAR NPRM*") at ¶¶16.

gramming has grown by nearly 450 percent. The independent stations in the top 50 markets has grown from 1.3 percent to 5.8 percent per market, on average. There has been a 30% increase in the number of public broadcast stations since 1984.[23] Seventy percent of all television households now receive 11 or more over-the-air channels. Even without considering the increase in other competitive media outlets, it is clear that the number of competing broadcast stations has increased substantially, as well as the number of outlets and the number of TV programs being shown to the average household.[24]

15. The Commission proposes, in the instant *FNPRM*, to limit consideration of significant developments in other video distribution services since the 1970's to the increase of accessibility to cable TV, which has grown from 17.5 percent U.S. household penetration in 1975 to 62.5 percent penetration today, and to the proliferation of public broadcast stations.[25] Cable subscribers nationally receive an average of 39 channels.[26] However, contrary to the Commission's proposal, FOE believes that other video services, such as DBS, wireless cable, SMATV and low power television and VCRs should also be considered as competition for broadcast television in the national and local marketplaces. Wireless cable, SMATV and low power television are fast becoming viable video delivery services, competitive with broadcast television and cable TV, and should be considered in some way as competition which warrants elimination or relaxation of the present restrictions. As noted by the Commission and as set

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[23]*FNPRM* at ¶25.

[24]All the foregoing facts were cited in the *PTAR NPRM* at ¶16.

[25]*FNPRM*, ¶29.

[26]*FNPRM*, ¶18. As noted by the Commission, cable service is potentially available to nearly all U.S. households. *Id.*

forth in detail in the recent *Cable Competition Report*,[27] many consumers subscribe to wireless cable, and direct broadcast satellite, and have purchased home satellite receivers and VCR cassette recorders, all of which provide alternative means of delivery for video programming. The number of VCR's jumped from 40.4 million in 1987 to 48.63 million in 1988, an increase of more than 20% in just one year.[28] In 1994, MMDS systems served 550,000 subscribers nationwide. SMATV systems serve approximately a million subscribers, and about four million households own a home satellite dish.[29] Newer technologies, such as Direct Broadcast Satellite service ("DBS") are now operational and have the capacity to transmit a significant number of video channels direct to the U.S. household from satellite transmitters.[30] The print media have also continued to make important contributions to viewpoint diversity and provide further economic competition in local markets.[31] The competition is expected to increase, with new competition expected from video dialtone service provided by telephone companies, computer internet services, and continued growth in competition from wireless cable services and the newer DBS service.[32] Advances on the information superhighway driven by the merging of computer and

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[27]*Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming ("Cable Competition Report")*, ___ FCC Rcd ___, 75 RR 2d 1415 (September 28, 1994).

[28]See, *The Kagan Media Index*, Paul Kagan Associates, Inc., May 17, 1988, at 3.

[29]*See FNPRM*, at ¶27.

[30]*FNPRM*, ¶19. DirecTV and United States Satellite Broadcasting ("USSB") have capacity for 216 and 20 channels, respectively, and DBS is marketed in over 41 states. Primestar, a DBS service owned and operated by six cable owners has been operational since 1991. *Id.*

[31]See, *Second Report and Order, MM Docket No. 87-7*, 65 RR 2d at 1593 (1989).

[32]*PTAR NPRM*, ¶21.

communications technologies, fostered by the FCC's own deregulatory initiatives, and the remarkable decline in the costs of computer processing, have led to the emergence of entire new industries devoted to providing consumers with access to an unparalleled range of information sources.[33]

16. This substantial increase in the availability of alternative media delivery systems has added to viewpoint diversity and has stimulated economic competition in the marketplace. None of these alternative video delivery services may safely be ignored; while any one video delivery service standing alone, may not provide sufficient competition to fit the Commission's proposed model, all such emerging video delivery technologies together constitute formidable competition to broadcast stations, and cannot reasonably be ignored in this Rule Making.

17. The Commission has previously recognized that its diversity policies must be analyzed within the *broad* framework of the information marketplace and the diverse technologies that exist within that marketplace for the delivery of information to consumers.[34] These technologies include not only those of the mature and still growing broadcast and cable industries, but *all* the new and emerging services and/or technologies such as Low Power Television, wireless cable, and information services available through personal computers or other video terminals. The current proposal, which eliminates certain services as insufficiently competitive to serve as substitutes for broadcast television under an

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[33]In 1981 the penetration of personal computers in the home market was 340,000 units. By the end of 1985, penetration had increased to an estimated 12 million units. *See*, Huber, *The Geodesic Network*, 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY. The Internet is fast becoming a major source of information and networking between companies and individual households, and is already a source for fast-breaking news which is competitive with broadcast TV news and the print media.

[34] See e.g., *Television Deregulation*, 98 FCC 2d 1076, 1138, 56 RR 2d 1005; *National Multiple Ownership Rules, 56 RR 2d at 864.*

antitrust analysis, overlooks the fact that all these services exist in competition *and in symbiosis* with each other in a rapidly evolving technological scenario, where new technology and explosive growth have become common. No one service should be eliminated from consideration, and quantitative analysis should not replace the conceptual and qualitative analysis which has heretofore characterized the Commission's analysis of its restrictions.

18. As the Commission noted in its *Second Report and Order in MM Docket No. 87-7*, since 1970 the number of broadcast outlets at the *local* level has increased dramatically throughout small, medium and large sized media markets. According to the FCC's findings, the top 25 markets average 13.4 over-the-air television signals, 29.8 commercial AM stations, 29.2 commercial FM stations, 41.9 programmed cable channels in use with a 44% penetration rate, 2.8 locally published or significantly read newspapers, 12 significantly-read magazines, and a VCR penetration rate of 54.1%. And, as far as the smaller markets are concerned, they too have an abundance of communications outlets. For example, the smallest media markets (market size 201-209) have about nine radio and television outlets, as well as an average access to an additional 20 cable channels. Finally, although the number of significantly read daily newspapers declines from an average 2.8 dailies in the top 25 markets to 0.7 in markets 201-209, the average number of significantly read magazines remains relatively constant at about 11 for each market group. *Second Report and Order, supra*, 65 RR 2d at 1592-93.

19. Although there has been a tremendous growth in the number of media outlets on a national basis, the fact that the smaller markets have an abundance of new sources of information demonstrates that there is substantial

diversity on the local level as well. For example, 94% of the television households in the U.S. receive five or more TV signals, up from 79% in 1975.[35]

20. Given the growth of radio, television, cable television, VCR's, satellite master antenna systems, wireless cable services, DBS, and the computer-information processing technologies, it would be difficult to dispute that the Commission's goal of establishing media diversity in substantially all media markets has been achieved.[36] The elimination of numerical restrictions on the ownership of television station outlets would thus not undermine, in any significant way, the diversity of video programming now available to the public in virtually every market.

21. Moreover, an artificially low limit on national audience reach does nothing to advance program diversity, and may, in fact, thwart it, since such a rule does not take into account the number of video services already available in either the average, or a particular video market. Given the multiplicity of video and information sources, the only pertinent rational restrictions should be those imposed under antitrust regulations. Elimination or substantial relaxation of the absolute numerical and "national audience reach" limitations in 47 CFR §73.3555(d)(2) would likely promote diversity of programming by permitting existing and emerging multiple owners entry into a greater number of video markets. Economies of scale achieved by ownership of a greater number of stations than twelve would make entry into small markets more economically attractive, thereby creating greater, not lesser, program diversity in those markets.

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[35] *See, OPP Report, supra,* at 17.

[36] The fact that the various media may not be perfect substitutes for one another does not negate their status as competing, antagonistic sources of information for the purposes of diversity analysis.

22. With an abundance of video program sources available in every size media market, the Commission must conclude that its reasoning behind instituting numerical ownership limitations are no longer warranted. As noted above, given the varied choices of communications outlets available to consumers in all sized media markets, diversity of opinion and information is no longer a viable concern.

23. Accordingly, FOE strongly urges the Commission to amend §73.3555 of the Rules to eliminate the national numerical limitation as well as the "audience reach" restrictions for broadcast television.

B. The Commission Should Substantially Relax the Television Duopoly Rule to Permit Joint Operation of Broadcast Television Stations in the Same Market.

24. From the previous analysis, it is apparent that, however warranted may have been the Commission's concerns about media concentration of control in local markets twenty years ago, those concerns are no longer valid today. Now, the *average* market has 36 cable channels, 10 over the air television signals, 20.4 AM and 19.5 FM radio signals, 1.9 newspapers, 11.8 magazines with subscription rates figures of at least 5%, and a VCR penetration rate of 48.7%. With such a proliferation of media outlets in the *average* market and such a diverse range of viewing choices for the citizen presently available even in small markets, the Commission must change its duopoly restrictions consistent with its relaxation of the duopoly rules for radio.[37]

25. If the Commission's concern in limiting television ownership to "one-to-a-market," is undue concentration of control over the alternative viewing sources of information in a market, then surely, the local cable system operator,

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[37]*Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992), *recon. granted in part*, 7 FCC Rcd 6387 (1992), *further recon.*, 9 FCC Rcd 7183 (1994).

who controls the distribution of as many as 100 different channels with penetration as high as 62% of households, has the greatest concentration of control. The broadcast television licensee, with only one channel of over-the-air programming to offer the local audience, would have the least. Even assuming that the recent changes in the Communications Act granting must-carry privileges to local television stations on cable systems increases the dissemination of a television station's reach in a given market area, the sheer number of additional channels available on the cable system undermines any concern that should be felt over potential concentration of control by any one broadcasting source. While there may be a few small markets where concerns over potential adverse impact of television duopolies might have legitimacy, such concerns have little or no validity whatever in the vast majority of television markets today.

26. In fact, the current television duopoly rules, to the extent that they impede the competitiveness of television licensees *vis-a-vis* other video programming suppliers, may be counterproductive to the Commission's diversity goals. The decline in local broadcast television revenues ultimately will be reflected in lower quality programming, and fewer broadcast viewing choices for the public. According to the Office of Plans and Policy, this will happen sooner, and more severely in smaller markets than in larger markets.[38]

27. The substantial rise in the multiplicity of media outlets considerably undercuts both the diversity and economic competition justifications that have long served as the rationale for multiple ownership limitations on the local level.

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[38] "In markets below the top ten, more than half of all independent stations are already experiencing losses, at least on paper. Here, a reduction in the number of stations may occur, which would reduce over-the-air choice.... The number of broadcast markets in which broadcast stations provide a competitive check on cable systems probably will [also] decline."

OPP WORKING PAPER, *supra.*, at 160.

First, the increase in the total base number of stations invariably dilutes the relative significance of multiple ownership within a market as a potential threat to adequate program diversity. Since the broadcast ownership restrictions were adopted at a time when the total number of stations was substantially less than exists today, the likelihood was much greater that multiple ownership could confer considerable sway over public opinion. However, in today's telecommunications marketplace, with its myriad voices, such an outcome is highly unlikely.[39]

28. Accordingly FOE respectfully urges the Commission to amend 47 CFR §73.3555 to allow for a presumption for dual ownership in the largest markets, in order to avoid imposing any undue burden on applicants for dual ownership. FOE also urges the Commission to permit dual ownership of more than one television broadcast license in a market, upon a showing that there are sufficient additional video programming sources in the marketplace to ensure that the Commission's diversity goals would not be adversely affected. The Commission should instruct its Staff routinely to grant such applications. In very small markets, a case-by-case approach should be used, with a minimum number of remaining broadcast outlets used as the standard for grant of applications proposing dual ownership. Such an approach, in addition to counteracting the continuing decline of broadcast television *viz* its competitors, would be the least restrictive means of furthering an important governmental interest in promoting viewer choice.[40] As argued below, FOE believes the Commission is *constitution-*

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[39]Similarly, the growth in media outlets directly diminishes the likelihood that multiple ownership within the same service in a particular market might afford licensees sufficient economic power to permit anti-competitive behavior. As the number of alternative outlets rises, the capacity of any given level of group ownership artificially to restrict output and increase prices necessarily declines.

[40]*Cf. United States v. O'Brien*, 391 U.S. 367 (1968).

ally obliged to modify its rules to be the least intrusive on First Amendment rights in pursuing its public interest goals.

C. The Commission Should Eliminate the One-to-a-Market Rule to Permit Joint Ownership and Operation of Multiple Broadcast Media in the Same Market.

29. Similarly, and based on the same facts set forth in Section B, above, it is apparent that there is no further need for the one-to-a market rule which precludes ownership of television and radio broadcast stations in the same market. Given the average number of radio stations available in any given market, it is axiomatic that ownership of a television station plus two or more radio stations in any market (consistent with present radio duopoly rules) would not, in most cases, effect any undue concentration of control of stations or viewpoints.

30. On the other hand, permitting joint ownership arrangements in television and radio services would promote economies of scale which would proving effective in improving broadcast service by promoting better quality programming at all levels, audio as well as video. Had the Commission not permitted such joint arrangements to occur in the radio service with respect to AM/FM combinations, many AM radio stations would no longer be providing service to their communities. Allowing television stations to share in the joint arrangements will allow broadcast licensees to distribute ever-decreasing broadcast revenues in a way that will allow them to be competitive with other video and audio information sources, and to pool their resources to survive in the marketplace.

31. FOE submits that there is simply no rational basis for continued enforcement of the television one-to-a-market rule, and urges the Commission to

eliminate that rule as an unnecessary and unwarranted intrusion into licensees' rights under the Constitution.

D. The Newspaper-Broadcast Cross-Ownership Rule as Applied to Broadcast Television Should be Eliminated or Substantially Relaxed.

32. The Newspaper-Broadcast Cross-ownership "NBCO" Rules[41] were first proposed by the FCC in 1968, in order to codify a general proscriptive rule. Up until that time, the Commission had been proceeding on a case-by-case basis in determining whether a proposed newspaper-broadcast combination would constitute an undue concentration of media control in a particular market. The case-by-case method favored the proposed combinations in most instances.

33. While initially proposing the complete breakup of newspaper-broadcast combinations over a five-year period, the Commission adopted a policy which proscribed *future* newspaper-broadcast combinations, but "grandfathered" all but a handful of "egregious cases," the owners of such co-located properties being ordered to divest.[42] Part of the reason for the Commission's change of heart had been the statistical evidence submitted during the NBCO proceeding that newspaper-owned television stations actually produced a larger percentage of news,

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[41]The rule is currently set forth in 47 CFR §73.3555(d):

> No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:
>
> (1) The predicted or measured 2 mV/m contour for an AM station, computed in accordance with §73.183 or §73.186, encompassing the entire community in which such newspaper is published; or
>
> (2) The predicted 1 mV/m contour for an FM station, computed in accordance with §73.313, encompassing the entire community in which such newspaper is published; or
>
> (3) The Grade A contour for a TV station, computed in accordance with §73.684, encompassing the entire community in which such newspaper is published.

[42]*Second Report and Order* Docket 18110, released 1/31/75).

public affairs, and other public service programming than did independently owned television stations. In addition, the Commission also expressed the fear that a complete breakup would cause such instability in the industry as to *dis*serve the public interest, convenience and necessity.

34. Moreover, in announcing the adoption of the NBCO Policy, the Commission made no findings that newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily speak with one voice, to the detriment of the public interest. No conclusions were drawn as to whether such combinations were harmful to competition, and the Commission expressly stated that it had found no pattern of specific abuses by existing cross-owners.[43] Despite this lack of evidence, the Commission adopted the Policy, and codified it into what is now 47 CFR §73.3555(d).

35. On appeal, however, the D.C. Circuit reversed that portion of the rules which grandfathered existing combinations, and ordered the FCC to adopt a rule requiring divestiture of all such combinations. Given the primary goal of the FCC to promote *diversity of thought and opinion* in its broadcast licensing decisions, the Court said that considerations such as industry stability and a past history of public service were entitled to little weight, and that the Commission was compelled to announce a *presumption*, as a matter of law, that co-located newspaper-broadcast facilities do not serve the public interest.[44]

36. The U.S. Supreme Court reversed. While it upheld the constitutionality of the NBCO Policy, it agreed with the FCC that full-scale divestiture was unnecessary. The Court said that industry stability and public service were legitimate public interest goals which the FCC was entitled to take into account,

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[43]*Id.*, 50 FCC 2d at 1072, 1099.

[44]*National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

and that the decision to make the NBCO Rules prospective in application only was permissible as a reasonable agency response to changed circumstances in the broadcasting industry.[45]

37. In 1987, FOE petitioned the Commission to institute Rule Making proceedings looking to the repeal of the NBCO Policy. A number of other parties filed comments in support of FOE's petition. As a result of Congressional intervention in the form of a rider to an appropriations bill,[46] the Commission declined to initiate rule making proceedings.[47] FOE believes it is once again appropriate to question whether the public interest is being served by the Policy in view of the proliferation of media, and the competitive disadvantages now faced by broadcast television.

38. While grandfathered newspaper-broadcast combinations have remained relatively stable since 1975, the face of the media marketplace today has

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[45]*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[46]Public Law No. 100-202 (Dec. 22, 1987) (also referred to as the *Hollings Amendment*).

[47]It was no secret that the appropriations rider had been aimed at Rupert Murdoch, who, through his acquisition of Metromedia, had also acquired ownership of television stations in the New York and Boston markets, in which he also owned daily newspapers. The rider to the appropriations bill passed and President Reagan did not veto the measure.

NewsAmerica Publishing, Inc., owned by Murdoch, then sought an extension of the temporary (18-month) waivers it had received earlier. After being turned down by the FCC which cited the Hollings Amendment, NewsAmerica appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and challenged the constitutionality of the amendment. The Court, while refusing to rule on the validity of the more general prohibition of funding for rule making proceedings, did strike down that part of the amendment which forbade the FCC from granting or extending waivers. The Court, after reviewing the legislative history and post-adoption colloquies on the Senate Floor, ruled that the amendment had targeted Murdoch so specifically and exclusively as to be tantamount to a "bill of attainder," a violation of the First Amendment, and a denial of Murdoch's rights to equal protection under the Fifth Amendment. (*NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (1988)). The more general question of whether Congress could keep the FCC from reexamining the NBCO Rules was deemed not yet ripe for review.

changed beyond all recognition. The lack of diversity which Congress, the Department of Justice, and the FCC were lamenting in the 1970's has turned into an uncontrolled explosion of electronic media choices that brings with it new problems in economic stability and spectrum management. Market domination, however, is not one of them. In 1985 the Commission announced that its goal of media diversity had been essentially achieved in all markets, and that heavy-handed government intervention in the form of content, and even arbitrary structural regulations, were no longer necessary and perhaps even counterproductive.[48]

39. The number of diverse sources of information has increased tremendously from the time of the implementation of the NBCO Policy. This upsurge in diverse sources of voices, however, has been tempered by the downward spiral of daily newspapers in this country. Since the adoption of the rules in 1975, the number of daily newspapers in this country has declined by 219.[49] Such a decline in the viability of an historically important institution poses a danger to our democratic society.

40. The governmental interest which formed the basis for the adoption of the NBCO Policy has substantially evaporated. As noted above, the basis given by the Commission, and accepted by the Supreme Court,[50] as justification for the Policy was that it would promote the First Amendment related goal of diversity

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[48]*See Syracuse Peace Council*, 2 FCC Rcd 5043, 63 RR 2d 541, 576-577 (1987).

[49]In 1975 there were 1,756 Dailies; in 1994 there were only 1,538. American Newspaper Publishers Ass'n. *Facts About Newspapers, 1995*, p.17. Although new dailies have been started since 1975, there has been a decline in the total number of dailies being published every year since 1960. *Id.* The most recent victim of this appalling attrition was THE HOUSTON POST, bought out by the competing HOUSTON CHRONICLE, which promptly closed it down. "A One-Newspaper Town," TIME, May 1, 1995, p.33.

[50]The NBCO Policy was upheld by the U.S. Supreme Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).